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No. 93-1592

In the Supreme Court of the United States

OCTOBER TERM, 1993

INTERNATIONAL HOUSE OF PANCAKES, PETITIONER

v.

THEODORE A. PINNOCK

AND

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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14 pp

QUESTIONS PRESENTED

Title III of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12181-12189 (Supp. IV 1992), prohibits discrimination on the basis of disability in places of public accommodation, including restaurants. The petition for a writ of certiorari raises the following questions:

1. Whether Congress has authority under the Commerce Clause to apply Title III's nondiscrimination requirements to a privately owned restaurant that caters to travelers and is part of an industry that affects interstate commerce.

2. Whether Title III intrudes upon state sovereignty in violation of the Tenth Amendment.

3. Whether Title III, to the extent that it covers facilities that were in existence at the time of the enactment of the ADA, is retroactive legislation that violates the Due Process Clause of the Fifth Amendment.

4. Whether Title III unconstitutionally delegates legislative authority to the executive and judicial branches of the federal government.

5. Whether Title III—when read in conjunction with the legislative history, the administrative regulations interpreting the statute, the preamble to those regulations, and a technical assistance manual issued by the Department of Justice—provides sufficient guidance to defendants to withstand a vagueness challenge under the Due Process Clause of the Fifth Amendment.

6. Whether Title III, insofar as it requires private businesses to alter existing facilities to make them accessible to persons with disabilities, effects a taking of property without just compensation, in violation of the Fifth Amendment.

PARTIES TO THE PROCEEDING

Petitioner's list of parties (Pet. iii) is incomplete. The following were parties to the proceeding in the district court: Theodore A. Pinnock; the United States of America; International House of Pancakes Franchisee (Majid Zahedi d/b/a International House of Pancakes); Nader Afshar; Does 1 through 10; and Roes 1 through 50.

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OPINION BELOW

The opinion of the district court (Pet. App. 1a-34a) is reported at 844 F. Supp. 574.[1]

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[1] The district court issued its original opinion on November 8, 1993. On February 2, 1994—after the notice of appeal was filed—the district court issued a revised opinion, which is reproduced in the appendix to the petition for a writ of certiorari before judgment. On April 7, 1994, the court issued a third version of the opinion, which is published at 844 F. Supp. 574. The differences among the three versions are irrelevant for purposes of this petition.

JURISDICTION

The judgment of the district court (Pet. App. 38a) was entered on November 24, 1993. Petitioner filed a notice of appeal on November 23, 1993 (Pet. App. 39a-40a),[2] and the case was docketed in the court of appeals on January 7, 1994. No. 94-55030 (9th Cir.). The petition for a writ of certiorari before judgment was filed on April 8, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 2101(e).

STATEMENT

1. On September 9, 1992, respondent Theodore A. Pinnock, who has cerebral palsy, filed suit against the owner and operators of an International House of Pancakes (IHOP) restaurant in San Diego, California. Respondent alleged that IHOP had discriminated against him in violation of Title III of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12181-12189 (Supp. IV 1992).[3] His complaint sought injunctive relief and attorneys' fees, but not damages, on the Title III claim. Pinnock's lawsuit was based on an incident that occurred while he was dining at the IHOP restaurant in June, 1992. Pinnock, who cannot walk, tried unsuccessfully to enter the restaurant's restroom in his wheelchair. The doorway to the restroom was not wide enough to allow entry of the wheelchair, and, as a result, Pinnock had to get out of the chair and crawl into the restroom. Pet. App. 2a; 844 F. Supp. at 578.

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[2] Although IHOP's notice of appeal was premature, it will be treated as having been filed on the date the district court entered judgment. See Fed. R. App. P. 4(a)(2).

[3] Pinnock's complaint also raised various state law claims. See Pet. App. 2a; 844 F. Supp. at 578.

2. IHOP filed a counterclaim for declaratory relief, contending that Title III is unconstitutional, at least as applied to existing facilities.[4] Pursuant to 28 U.S.C. 2403(a), the district court notified the Attorney General that the constitutionality of a federal statute had been drawn into question, and the United States intervened in the case solely to defend the constitutionality of Title III. IHOP and the United States then filed cross-motions for summary judgment on the constitutional issues raised in IHOP's counterclaim. Pet. App. 2a; 844 F. Supp. at 578.

3. The district court rejected each of IHOP's constitutional challenges to Title III. (A) The court held that Congress has authority under the Commerce Clause to apply Title III's nondiscrimination requirements to petitioner's restaurant, which catered to travelers and was part of an industry that affected interstate commerce. Pet. App. 3a-5a. (B) The court held that Title III is not unconstitutionally vague. *Id.* at 5a-16a. (C) The court rejected petitioner's due process challenge, holding that, since Title III does not impose liability for conduct occurring before the statute's effective date, it is not retroactive legislation. *Id.* at 16a-17a. (D) The court held that Title III does not unconstitutionally delegate legislative authority to the executive and judicial branches of the federal government. *Id.* at 18a-22a. (E) The court rejected petitioner's contention that the

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[4] Title III also imposes requirements for construction of new facilities. See 42 U.S.C. 12183(a)(1) (Supp. IV 1992). The statute further provides that if a business makes certain alterations to its facilities, those changes shall be done "in such a manner that, to the maximum extent feasible, the altered portions * * * are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs." 42 U.S.C. 12183(a)(2) (Supp. IV 1992). These requirements were not at issue in the district court.

statute, by requiring private businesses to remove barriers to access in existing facilities where "such removal is readily achievable," 42 U.S.C. 12182(b)(2)(A)(iv) (Supp. IV 1992), effects a taking of property without just compensation in violation of the Fifth Amendment. Pet. App. 23a-29a. (F) Finally, the district court held that Title III does not displace local building codes and thus does not intrude upon state sovereignty in violation of the Tenth Amendment. *Id.* at 29a-31a. Accordingly, the district court denied IHOP's motion for summary judgment, granted the United States' cross-motion for summary judgment, and dismissed IHOP's counterclaim. *Id.* at 32a.

At IHOP's request, the district court directed entry of judgment on the counterclaim after certifying, pursuant to Fed. R. Civ. P. 54(b), that there was "no just reason for delay." Pet. App. 35a-37a. Final judgment on the counterclaim was entered on November 24, 1993. *Id.* at 38a. Pinnock's federal and state law claims against IHOP are still pending in the district court.

4. The United States has filed a motion in the Ninth Circuit seeking a remand of the case to the district court for a determination whether the Title III claims have become moot as a result of a fire that has destroyed the IHOP restaurant. See 844 F. Supp. at 578 n.2 (noting destruction of restaurant). On April 28, 1994, Justice O'Connor denied petitioner's application for a stay of proceedings in the Ninth Circuit pending this Court's action on the petition for a writ of certiorari before judgment. The court of appeals subsequently issued an Order to Show Cause why the appeal should not be dismissed. Since that time the court of appeals has not issued any further order regarding the status of petitioner's appeal.

ARGUMENT

1. Petitioner's claims appear to be moot. On January 13, 1994, a federal grand jury in the Southern District of California returned an indictment charging three defendants—including Nadar Nazemi Afshar and Majid Zahedi, who are also defendants in the present case—with violations of federal law for allegedly destroying, through use of fire, the IHOP restaurant at issue in the present case. See *United States* v. *Nadar Nazemi Afshar, Nazanin Entezam and Majid Zahedi*, Crim. No. 94-0046-R (S.D. Cal.). The indictment alleged that the fire took place on or about December 20, 1993, after entry of judgment by the district court in the present case. See 844 F. Supp. at 578 n.2 (noting that restaurant was destroyed by fire on December 20, 1993).[5]

In light of the destruction of the restaurant, the United States has filed a motion in the court of appeals seeking a remand of the case to the district court for a determination whether the fire has mooted the Title III claims. See Motion of United States for Remand to Determine Whether Federal Law Claims Are Moot, *Pinnock* v. *IHOP*, No. 94-55030 (9th Cir.) (Motion for Remand). In its response to that motion, petitioner admits that the building was destroyed. Petitioner does not deny that the Title III issues are moot, but argues that the question of mootness can be determined by the court of appeals, or by this Court if certiorari is granted.[6]

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[5] Several months after entry of judgment, the district court issued a revised opinion that noted the restaurant's destruction. See note 1, *supra*.

[6] Respondent Pinnock has also filed a response to the Motion for Remand. Pinnock argues that the case may not be moot because it has not been proved that the restaurant was totally destroyed. To

Title III authorizes the Attorney General to seek damages on behalf of an aggrieved person, 42 U.S.C. 12188(b)(2)(B) (Supp. IV 1992), but it does not provide for damages awards in actions by private individuals.[7] Pinnock's complaint sought injunctive relief and attorneys' fees, but not damages, on his Title III claims. See Motion for Remand, *supra*, at ¶ 1. Thus, destruction of the restaurant would preclude Pinnock from obtaining any effective relief on his ADA claims even if he could prove that IHOP violated Title III.[8]

Because Pinnock has no prospect of obtaining relief against IHOP under Title III, he no longer has a "personal stake in the outcome" of this case. *Lewis* v. *Continental Bank Corp.*, 494 U.S. 472, 477-478 (1990) (parties must retain a "personal stake in the outcome" through all stages of a case, including appeal) (citation omitted). See also *DeFunis* v. *Odegaard*, 416 U.S. 312, 316 (1974) (per curiam) ("federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them") (quoting *North Carolina* v. *Rice*, 404 U.S. 244, 246 (1971) (per curiam)).

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the extent that the determination as to mootness requires resolution of disputed factual issues, that task is appropriately performed by the district court.

[7] Under 42 U.S.C. 12188(a)(1) (Supp. IV 1992), "[t]he remedies and procedures set forth in section 2000a-3(a) of this title are the remedies and procedures [Title III of the ADA] provides to any person who is being subjected to discrimination on the basis of disability." This Court has held that the remedies available under 42 U.S.C. 2000a-3(a) (in suits alleging racial discrimination in places of public accommodation) do not include damages. *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968) (per curiam).

[8] Pinnock's request for attorneys' fees under the ADA would not save IHOP's constitutional challenges from mootness. See *Lewis* v. *Continental Bank Corp.*, 494 U.S. 472, 480 (1990).

Although denominated a counterclaim, IHOP's constitutional challenge was raised as a defense to liability in the lawsuit brought by Pinnock. Because the underlying controversy between the parties is moot, the issue of the statute's constitutionality is moot as well. That conclusion is especially appropriate here, where IHOP has emphasized that it is challenging "the constitutionality of only Title III of the ADA as it applies to *existing* facilities." Pet. 13. Destruction of the restaurant eliminated any live controversy between the parties regarding the statute's application to "existing" facilities.

2. Even if the controversy between the parties remained a live one, the petition for a writ of certiorari before judgment should be denied. Petitioner asks this Court to take the extraordinary step of issuing a writ of certiorari before the court of appeals has had the opportunity to consider IHOP's constitutional claims. Certiorari before judgment "will be granted only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate settlement in this Court." Sup. Ct. R. 11. See also *United States* v. *Nixon*, 418 U.S. 683, 686-687 (1974). Because of this stringent standard, certiorari before judgment is an "extremely rare occurrence." *Coleman* v. *PACCAR Inc.*, 424 U.S. 1301, 1304 n.* (1976) (Rehnquist, J., in chambers). Even without the mootness problem, this case would not warrant exercise of such an "extraordinary power." *Ohio* v. *Price*, 360 U.S. 246, 247 n.1 (1959) (Brennan, J.).

Petitioner tries to equate the present case with five others in which this Court has granted certiorari before judgment. See Pet. 11. No such comparison is plausible. Four of those cases involved one or more of the following matters: pressing questions of foreign policy or national

defense,[9] the need for immediate action to preserve the institutional authority of the federal courts,[10] or concerns about subjecting the President of the United States to protracted litigation in the lower courts.[11] In the other case cited by petitioner, this Court expressed concern about the "disarray" among the lower courts on an issue critical to the functioning of the federal criminal justice system. *Mistretta* v. *United States*, 488 U.S. 361, 371 & n.6 (1989) (noting conflicting decisions; upholding constitutionality of the federal Sentencing

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[9] See *Dames & Moore* v. *Regan*, 453 U.S. 654, 660 (1981) (validity of President's actions pursuant to executive agreement between United States and Iran that was designed to end the Iran hostage crisis); *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 582-584, 589-592 (1952) (executive order seizing steel mills in order to avert nationwide strike that President believed would jeopardize the United States' effort in the Korean War); *Ex parte Quirin*, 317 U.S. 1 (1942) (challenge to President's decision to have a military tribunal, rather than civil courts, try Nazi saboteurs). See also Lindgren & Marshall, *The Supreme Court's Extraordinary Power to Grant Certiorari Before Judgment in the Court of Appeals*, 1986 Sup. Ct. Rev. 259, 291-294.

[10] See *United States* v. *Nixon*, *supra* (subpoena to the President to produce White House tapes); *Ex parte Quirin*, *supra* (use of military tribunal to try Nazi saboteurs). See also Lindgren & Marshall, *supra*, 1986 Sup. Ct. Rev. at 287, 294-295 (in *Nixon*, the White House suggested that it might ignore an adverse decision by the court of appeals; in *Quirin*, "an intermediate court opinion would have carried little weight" where the lawyer for the government had warned that President Roosevelt might defy the Supreme Court).

[11] See *United States* v. *Nixon*, *supra*; *Youngstown Sheet & Tube Co.* v. *Sawyer*, *supra*. See Lindgren & Marshall, *supra*, 1986 Sup. Ct. Rev. at 288 ("Preserving the dignity of particularly important defendants may also in part explain the *Nixon* and *Steel Seizure* cases. There is a legitimate interest in protecting presidents and foreign sovereigns from lengthy litigation in the lower courts.").

Guidelines). No such disruptive conflict exists here. Indeed, we are aware of no court other than the district court in this case that has addressed a constitutional challenge to Title III of the ADA. See Pet. 4 (questions in this case "are ones of first impression"). The present case presents no justification for departure from the normal appellate process remotely comparable to those in the cited cases.

3. Review of the present case by this Court would be unwarranted even outside the extraordinary context of certiorari before judgment. The district court applied well-established legal principles and correctly rejected petitioner's constitutional challenges to Title III. Petitioner does not contend that the district court's ruling conflicts with this Court's precedents or with any other judicial decision. Indeed, beyond restating the questions presented, see Pet. 12, petitioner makes no effort to explain why the decision of the district court was incorrect. Review by this Court is therefore unwarranted.

CONCLUSION

The petition for a writ of certiorari before judgment should be denied.

Respectfully submitted.

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